

## **MINUTES**

### **ETHICS REVIEW COMMISSION MEETING**

**June 1, 2016**

#### **CITY COUNCIL CHAMBERS**

**300 N. CAMPBELL STREET**

#### **MEMBERS PRESENT:**

Stuart R. Schwartz, Mayor – Presiding Officer  
Robert Warach, District 1  
Daniel Anchondo, District 3  
Mark-Thomas Bray, District 4  
Adolpho Telles, District 5  
Jed Untereker, District 6  
Emmanuel Echeverria, District 7  
Rafael Adame, District 8

#### **MEMBERS ABSENT:**

Audrey Ann Marrufo, District 2

#### **OTHERS PRESENT:**

Josie Aranda, Recording Secretary  
Sylvia Borunda Firth, City Attorney  
Ross Fischer, Attorney for Ethics Review Commission  
Jim Darnell, Attorney for Tommy Gonzalez  
Tommy Gonzalez, City Manager  
Emma Acosta, City Representative, District 3  
Felix Valenzuela, Attorney for Fred Lopez  
Camilo Jimenez  
Lindsey Adam  
Dora Y. Oaxaca  
Ann Morgan Lily, Witness (former City representative)  
Mark Sutter, Chief Financial Officer  
Julie Lozano, Communications & Public Affairs Manager  
Monica Lombraña, Director of Airport & CID

Media

#### **I. CALL TO ORDER**

There being a quorum, Presiding Officer Stuart Schwartz called the meeting to order at 9:07 a.m.

#### **II. APPROVAL OF MINUTES FROM APRIL 13, 2016.**

**Motion made by Mr. Adame to approve the revised minutes of April 13, 2016.** Mr. Telles seconded the motion, but Mr. Telles has an observation/correction to Item #4 in that the minutes do not state that Mrs. Borunda Firth's recommendation was to dismiss this particular issue. It talks about the appeal, but not a dismissal and should state it would be dismissed also.

Mr. Stuart asks Mrs. Borunda Firth if she has a comment and notes that the Commission had been advised in the prior meeting that it had been dismissed, but is not reflected in minutes.

Mrs. Borunda Firth comments that what was reported in the last meeting was that the first complaint against Ms. Ordaz was dismissed and the second one was under review because it was couched as an appeal and ordinance does not allow for an appeal process.

Mr. Stuart asks if the Commission wants to propose an amendment to address this issue. Mr. Telles says "Yes," agreed that they were informed it was dismissed, and there was an appeal, and these minutes say it was dismissed, and therefore the reason was an appeal.

Mr. Stuart asks if there is a 2<sup>nd</sup> to that amendment. Mr. Anchondo seconds, and the amendment to the minutes is approved unanimously.

Mr. Stuart asks for a vote on the minutes with the amendment. Minutes with the amendment are approved unanimously, and Minutes will be reworded to reflect the amendment.

### **III. UPDATE REGARDING ETHICS COMPLAINT FILED BY MRS. BARBARA CARRASCO AGAINST CITY REPRESENTATIVE CLAUDIA ORDAZ. (SYLVIA BORUNDA FIRTH 212-1100)**

Mr. Schwartz asks for comments from City attorney as well as other preliminary matters.

Sylvia Borunda Firth states that, as agreed, when she receives complaints, she advises the Commission. On May 18, 2016, she received a new complaint from Barbara Carrasco regarding Council woman Claudia Ordaz, that is in direct response to the no appeal process, so she did a new report. Mrs. Firth will seek outside counsel to assist because it involves a Council member and to avoid any appearance of impropriety and conflict of interest. Further reports will be provided in the future to the Commission.

Mr. Schwartz asks if it is going to be referred to the Commission. Mrs. Borunda Firth responds that it has not been decided. She will ask outside counsel to review to make that determination.

Other preliminary matters by Mrs. Borunda Firth:

She was asked by City Council yesterday (5/31/16) to do 2 things:

1. Received requests from members of the public to sign up to speak. She told Council and wants public to understand that this is not a public hearing where the public is engaged to provide input. This is quasi-judicial in nature. As an example, Mrs. Borunda Firth states that you couldn't show up at the courthouse and weigh in and provide an opinion unless you're an interested party. The proceedings today are being handled in the same manner and that's why the public is not allowed the opportunity to speak.
2. Council asked that she explain, more to the members of the public than to the Commission, the difference between the investigation by Mr. Fischer for the benefit of

City Council and these proceedings. There is some public confusion. It is not a duplication of efforts, and it's not as if Mr. Fischer's opinion has changed with what was presented to the City Council. Mr. Fischer was reporting regarding ball park financing and the delay of the issuance. The matter also seen by the Commission regarding the selection of the financial advisor and the way open records were handled by the City. Mr. Fischer was using appropriate state law and other City ordinances, policies and procedures. Mr. Tolbert's complaint is being dealt by the Commission and the standard is the ordinance which is different than state law and may have different outcomes like in a civil and criminal court.

Mr. Telles proposes to move Item VII up to get these issues addressed. Mr. Schwartz calls Representative Acosta to the lectern.

## **VII. PRESENTATION BY CITY REPRESENTATIVE EMMA ACOSTA REGARDING ACTIONS BY CHAIRMAN STUART SCHWARTZ.**

Mr. Schwartz calls Representative Acosta to the lectern.  
Emma Acosta, City Representative for District 3

Ms. Acosta distributes a letter sent by email to Commission. She states she has several concerns indicated in the letter and had provided some audio between her and Mr. Schwartz that she believes was not appropriate.

Ms. Acosta reads Ethics Ordinance Section 2.92.050(d), the standards of conduct. She believes she was being influenced to not make an appointment to Ethics Commission and she believes every council member should have an appointment to the board.

Mr. Schwartz asked for comments from the Commission.

Mr. Anchondo states that since he's the individual involved, when he came on, no evidence had been elicited regarding situation with Mr. Gonzalez. He will listen to the evidence same as all members and there are no preconceived idea of what evidence and decision will be.

Ms. Acosta reads Section 2.92.090 item (e) and item #5 of the Ethics Ordinance, and states that any member appointed prior to today is eligible to participate per the Ethics Ordinance, and that's why she felt his call to her was highly inappropriate.

Mr. Schwartz states he's not sure he agrees with interpretation of the ordinance.

## **IV. DISCUSSION AND POSSIBLE ACTION REGARDING SWORN COMPLAINT SUBMITTED BY JAMES TOLBERT AS IT RELATES TO CITY MANAGER TOMMY GONZALEZ.**

Mr. Schwartz moves to adjourn the El Paso Ethics Commission into closed session to seek advice of attorney on matters made confidential by the Texas Disciplinary Rules of Professional Conduct, pursuant to Tex. Gov't Code, 551.071, The Motion is seconded by Mr. Telles. Motion passed unanimously, and Commission retired to executive session at 9:19 a.m.

The Ethics Review Commission reconvened Open Session at 11:05 A.M. having taken no action on this subject matter in closed session.

## **V. HEARING ON SWORN COMPLAINT SUBMITTED BY JAMES TOLBERT AS IT RELATES TO CITY MANAGER TOMMY GONZALEZ.**

Mr. Schwartz sets out some parameters pursuant to §2.92.090(f)(1) in Ethics Ordinance limiting presentation of Complainant, Mr. Tolbert to 1 hour, 1 hour for Respondent, Mr. Gonzalez, and 1 hour for the Commission.

Mr. Schwartz states that Mr. Tolbert stands on his complaint and does not intend to appear or present any evidence.

Mr. Schwartz states that pursuant to 2.92.090(f)(1), proceedings will be in strict compliance with the procedures set forth in the Ethics Ordinance. Questions regarding the relevancy of testimony or cumulative evidence or witnesses can be raised by any member of the Commission. Opening and Closing statements limited to 15 minutes. Mr. Gonzalez's attorney will not be permitted to question or cross-examine witnesses without permission of the Commission.

Mr. Schwartz requests that all potential witnesses come forward and be sworn.

Josie Aranda, Recording Secretary for the Ethics Commission and Notary for the State of Texas swears in witnesses Tommy Gonzalez and Ann Morgan Lily.

Mr. Schwartz states the Mr. Darnell, on behalf of Mr. Gonzalez, requested that Mr. Gonzalez make a pre-hearing presentation. Commission chose to carry presentation as part of the evidentiary presentation during the course of the hearing and will be considered by the Commission subsequent to the hearing.

Mr. Schwartz requests to proceed with opening statement by Mr. Gonzalez, not by his attorney.

Mr. Gonzales states that he believe this matter is operational and has nothing to do with ethics and can be demonstrated by the presentation he will give later.

Mr. Fischer reserves his opening.

Mr. Schwartz calls Mr. Gonzalez to proceed with his presentation of evidence.

Mr. Schwartz states that the ordinance provides in 2.92.090(f)(2) that legal counsel may advise the respondent during the course of the hearing, but may not speak on behalf of the respondent,

except while testifying. The respondent or his legal counsel may not question or cross-examine witnesses, except with the permission of the Commission. Mr. Schwartz says he's open to the possibility, but will be a Commission decision. Mr. Darnell asks for that ruling now as it may affect how they proceed. Mr. Schwartz asks the Commission and the Commission agrees to allow Mr. Darnell to ask questions of Mr. Gonzalez at the appropriate time.

Mr. Gonzalez shows a power point presentation beginning with the facts of the 2 issues being "Resurfacing" and "Street Cushion" and refers to the 2015 Budget Resolution passed on 6/30/14 regarding the City Manager's authority regarding the Capital Improvement program; that both projects were CIP projects under \$500,000.

Mr. Gonzalez states that what he has demonstrated with regard to the street resurfacing, the Council directed and voted on it in 2012. The budget resolution reinforced the flexibility of adding or exchanging projects within the City Manager's authority or his designee, and this demonstrates that this is an operational issue and nothing to do with ethics, and the process that was followed based on the direction Council had given and the vote they took.

Mr. Gonzalez concludes his remarks by stating that any safety related concern in this City or any other city where he has been, that is brought to his attention, he does take action.

Mr. Darnell asks how the Commission would like to handle the exhibits. Mr. Schwartz asked him to mark the exhibits that he has introduced as G-1 through end so Commission can have them for purpose of deliberation.

Mr. Darnell introduces Exhibits 4, 6, 8, 12 budget resolutions and will introduce the others on the elmo. Mr. Schwartz says they will admit Exhibits 4, 6, 8 and 12.

Mr. Darnell offers Exhibit G-2, an email dated March 31, 2015, dealing with the resurfacing project. Mr. Gonzalez states the resurfacing project was not limited to District 2, Mr. Romero's district. The email was from Fred Lopez with a list of projects informing Mr. Gonzalez that they are set to begin construction projects with existing contract with JAR and resurfacing contract ZTEX. Mr. Lopez copies Mark Sutter and Irene Ramirez. Mr. Gonzalez answers that he did not instruct him to do any of those projects; that Mr. Lopez got his direction from the Council members. Mr. Gonzalez did not give him any further direction. He was just being informed. Mr. Darnell offers Exhibit G-2 is admitted.

Mr. Gonzalez identifies Exhibit G-3 as a reconstructing and resurfacing report. He states the report has District 1, 2, 3 through 8 and a list of projects tabbed for reconstruction and resurfacing. Mr. Darnell offers Exhibit G-3 and is admitted.

Mr. Gonzalez identifies pages 2 and 3 of Exhibit G-3 as District 1 list of reconstruction and resurfacing projects. Mr. Gonzalez affirms that some of the streets above gray line were from the 2012 plan and the ones under the gray line are all from the original plan. Mr. Gonzalez explains those under the heading, "Funding yet to be identified" on page 3, are additional requests from counsel for which there is no funding and they all had a list of those from the original plan because all of these streets were underfunded in the 2012 package, and these streets

were swapped for the new ones. The understanding was that these projects would not happen because they were underfunded. Mr. Gonzalez affirms that this exhibit reflects the same type of calculation for each district, by council member, by constituents, and streets that were swapped out.

Mr. Darnell goes to Exhibit 9, Clip of January 25, 2016, which shows Rep. Ordaz saying that it violated policy and if circumventing the rules, that's a serious concern, wants public trust that they are following policies and procedures in place and doesn't want to go down that road again. Mr. Darnell show another clip of January 25, 2016 showing Representative Acosta questioning Monica Lombraña who was confused when being questioned why not sticking to 2012 plan and on the other, why not addressing the priorities were important to constituents. Asked if she could get rollout for current projects and to complete resurfacing Council approved and awarded to contractor in January 2015. Mr. Darnell offers G-9 of a Special Council Meeting wher Representative Acosta questioned Monica Lombrana about the resurfacing issue and Ms. Lombrana indicated she was getting mixed message from Council. Exhibit G-9 is admitted.

Exhibit G-10 is a clip of a 12/7/15 Special Council Meeting where Representative Niland asks Mrs. Borunda Firth whether or not the action proposed is appropriate. Representative Niland explains the entire process on the resurfacing issue, including swapping streets on the 2012 Street Plan. Mrs. Borunda Firth opines with regard to what's legal. If the question was if the list approved was formal or staff recommendation, and the City Manager was working to gather input to formulate a new list, which is what Ms. Lombrana is asking, then that process is appropriate.

Mr. Darnell offers Exhibit G-10 and Mr. Schwartz request a context of Exhibit G-10. Mr. Darnell states that Representative Niland is summarizing when there's a council membership, mayoralship and needs in the community, they found a need to change streets and she described fieldtrips with engineering staff to identify what streets need to be dropped and added, and is asking Mrs. Borunda Firth if it was appropriate and was told that it was. Mr. Schwartz asks if it was Mr. Gonzalez's opinion that streets that were not on the CIP at all, could be added to the CIP without regard to need. Mr. Darnell responds "no," but that could be asked of Mr. Gonzalez, but they were going through with each council member and engineering staff to identify streets that may not need to be on the list and ones that needed to be added and thinks Dr. Noe said in one of the clips that they relied on Engineering staff to tell them if they were or were not appropriate and that was what was brought forward, what was in Exhibit 3 introduced previously with additions and subtractions. Mr. Telles trying to understand what was appropriate and didn't hear what Council reapproved as the revised list. Asking for clarification. There was a revised list and it's appropriate to do the revised list, but the second step, was it appropriate to act on that without Council approval? Mr. Darnell doesn't think so and he understood what was being discussed was the swapping process and ask if that process was appropriate and the answer was that it was appropriate. Mr. Gonzalez says he shared that in his presentation about how it was appropriate based on the 2012 action by Council in 5/24/12 when Mr. Robinson made the motion, was seconded and voted on and that by budget resolution #8 and 9, he or his designee can do that. Mr. Telles says there was approval in 2012, but no subsequent approval other than your authorization. Mr. Gonzalez responds that the approval in 2012 was to be able to exchange. That was the action, seconded and voted on and approved. Mr. Holguin was the only one who

voted against it for a different reason and the other item was in June 30, 2014. Budget Resolution #8 and 9 specified he or his designee the ability to exchange projects, change the amount, not to exceed \$500,000 if adding. Also commented on individual projects as opposed to funding category. The original list was approved by City Council with the direction that they wanted flexibility to be able to exchange projects with the approval that they gave him to do that. That's what was said on the video and reinforced on the Budget Resolution on June 30, 2014 in two separate resolutions. Mr. Anchondo asks if it was the same item as that of 2015 and Mr. Darnell responds that it is recalling that Rep. Robinson said they need flexibility cause things change and with that, he made the motion and the motion was approved.

Mr. Adame wants clarification of the video about the flexibility, but doesn't recall a vote taking place. Mr. Adame asks Mr. Gonzalez if Council gave him the ability to be flexible as to what to be paved or not. Mr. Gonzalez responds that by that action, yes.

Exhibit G-10 is admitted.

Mr. Darnell addresses Exhibit 11, which is Exhibit 10 from their submission to the Commission, which is the original 2012 Street Plan with the changes suggested by each Council members during the tours with Fred Lopez. Mr. Gonzalez knew about the field trips with Council members and Engineering staff. Mr. Gonzalez said Council asked for the field trips. Council said project in 2006 or 2007 were not done due to the flood. There's been a lot of consternation by Council since he's been here because of that list. Council wanted to do field trips. Council did not arbitrarily pick roads. The Pavement Management Index (PMI) did not take into consideration ratio traffic analysis and the methodology was flawed, by industry standard. Mr. Gonzalez has been doing this for over 25 years and roads in the 30s or 40s are not resurfaced, they are too far gone and need to be reconstructed, but there wasn't enough money budgeted. Roads in 70s or 80s are resurfaced to give it more life and makes more sense to do it that way has been in every city he has been in. He submits that that methodology was flawed. The higher the number the better the road. A zero would be a washed out road and 100 would be perfect; would be a brand new road.

Mr. Darnell asks Mr. Gonzalez if the notes on Exhibit 11 are the notes made on the field trips. Mr. Gonzalez assumes after the fact that he was shown the list, but was not privy to them before. He did not go on the field trips. He went on a familiarization tour with Council members when he got here, but not for streets. Mr. Darnell asks about notes of District 7 and Mr. Gonzalez says he doesn't remember this level of detail and did not get involved in, even though everyone thinks he was. Mr. Darnell offers Exhibit G-11, and is admitted by Mr. Schwartz. Without cover for Exhibit 10, Exhibit G-11 is 12 pages.

Mr. Darnell begins on the speed hump issue and asks Mr. Gonzalez to identify Gonzalez Exhibit 16. Mr. Gonzalez says it's an email from Ted Marquez to Fred Lopez, Irene Ramirez, Rodolfo Peña, Richard Bristol and someone named Molinar and next page is a speed hump request by Cathedral High School, a document sent by Ted Marquez to Fred. Mr. Gonzalez did not get a copy of that document. Mr. Darnell asks if that document raised concerns about the speed humps. Mr. Gonzalez says he did not read it all. He saw this document after this became an issue. Mr. Darnell offers Exhibit G-16 and is admitted.

Mr. Darnell introduces Mr. Gonzalez's calendar of January 22, 2105 as Exhibit G-17. Mr. Gonzalez describes the appointment he had for the day. Mr. Gonzalez says it was inclement weather and notice that City closing early that day. Mr. Gonzalez did not have any conversation with Fred Lopez about problems with speed humps for Cathedral; all he had was an email he had sent to Mark Sutter and Fred Lopez asking if the request can be done. Fred Lopez responded with the process to install the speed humps. Mr. Gonzalez says he would not have the level of detail. Mr. Darnell offers Exhibit G-17 and G-18 and are admitted.

Mr. Schwartz reminds Mr. Darnell that he has gone over an hour, but will permit him to proceed.

Mr. Darnell corrects Exhibit 18 to be Exhibit 20. Not admitting Exhibit 18.

Mr. Darnell introduces Exhibit G-21, which Mr. Gonzalez identifies as an email from Fred Lopez to Ted Marquez stating that he had spoken to Mr. Gonzalez and received the following direction, which Mr. Gonzalez states is not accurate. Mr. Gonzalez affirms that what Mr. Lopez is saying in the email is regurgitating what he had said in a memo to Mr. Gonzalez saying how it was going to be done. Mr. Gonzalez says he never told him to do it that way. Mr. Lopez never asked him if he wanted it done that way. Mr. Gonzalez had a presentation. Mr. Gonzalez sent an email to him and Mark Sutter asking how to resolve and how to respond because it was a safety issue and is a serious condition for the City. When they receive notice of that, they have to take action and that's what he did. The referenced email is the one that he cannot share as it's not admissible. Mr. Schwartz said that it's attorney-client privilege and the City hasn't waived it. Mr. Gonzalez says he wasn't talking about that email. When the Commission asked what email he was referring to and if he said he sent an email with respect to safety, he misspoke. He was referencing the email he sent to Fred Lopez and Mark Sutter on the 24<sup>th</sup>. He just said that "that" email backs up what he was saying, but shouldn't have said that. Mr. Schwartz asks Mr. Darnell to which email he was referring to. Mr. Darnell says it was Exhibit 19, but was part of Exhibit 20. Mr. Schwartz tells Mr. Gonzalez that the email exchange he was referencing was with respect to safety concern. Mr. Gonzalez clarifies that the email of the 24<sup>th</sup> he sent to Mr. Lopez and Mark Sutter, that's already been shown; that's what he was referencing. Mr. Schwartz says the January 24<sup>th</sup>, 3:54 p.m. email for him is one page and there is no reference to safety. Mr. Gonzalez reiterated that he said it was a safety matter so he sent an email requesting that something get done. Mr. Schwartz again says there's nothing in that email that suggests a safety concern. Mr. Gonzalez says that as he said in his presentation, the both time he went to the meetings, the both time they had asked for that and at that particular instance, that's when he sent that email to see if something could be done. If safety wasn't mentioned in the email, that's why he was reacting to it, because it was a safety matter and was concerned about it. Mr. Darnell asks Mr. Gonzalez if there's a reason in his mind to place traffic devices in a heavily congested school area, other than safety, to which Mr. Gonzalez responds, "no."

Mr. Darnell offers Exhibit G-21 and is admitted.

Mr. Gonzalez identifies Exhibit G-22 as his calendar of January 26, 2015, which is the day Fred Lopez told Ted Marquez, he met with Mr. Gonzalez or got his guidance. Mr. Gonzalez says he did not meet with or talk to him that day. Mr. Darnell offers Gonzalez 22 and is admitted.



Mr. Darnell asks if he can call a couple of witnesses. Mr. Schwartz responds that he needs to let Mr. Fischer ask his questions.

Cross-Examination by Ross Fischer:

Mr. Fischer offers Exhibit ERC-9, Capital Improvement Street Reconciliation Report presented to El Paso City Council on December 7, 2015, he and hands a copy to Jim Darnell. Exhibit ERC-9 is admitted.

Mr. Fischer asks Mr. Gonzalez if he approved a new street resurfacing plan for District 2 during the process of swapping or adding streets to the CIP Plan. Mr. Gonzalez responds that he never saw or approved a list.

Mr. Fischer asks Mr. Gonzalez if he approved a work zone map for District 2. Mr. Gonzalez responded that he doesn't remember seeing a work zone map.

Mr. Fischer asks Mr. Gonzalez if he asked staff to keep him up to date on District 2 resurfacing progress. Mr. Gonzalez responded that he asked staff to keep him up to date in all the projects in all the districts.

Mr. Fischer said in Mr. Gonzalez testimony, that he said that streets with a pavement condition index of 70s and 80s warranted resurfacing. Mr. Gonzalez responded that he said that in other cities that he's managed, when a city is in better condition and you resurface it, you extend its life as opposed to a road that's much less in grade usually under 50, requires reconstruction.

Referring to Exhibit ERC-9 where the projects are separated on Slide 17, which is Page 9 of the exhibit, Mr. Gonzalez affirms that it shows resurfacing projects that were completed. There's no response to Mr. Fischer's question that each street is a project and that the highlighted projects were projects that were added to the CIP. Mr. Fischer asks that only 2 projects have a PCI above 55 as shown on Page 12, Slide 23 where it says Louisiana from Richmond to Mobile had a PCI of 78, with a cost of \$170,925 was in District 2. Mr. Gonzalez says that that is according to this list. Mr. Gonzalez says there were other ones that were below 50 and one at 54. Mr. Fischer says that there are only two above 54 and there both in District 2. Mr. Fischer directs Mr. Gonzalez to go to Slide 25 where it says Polk from Byron to Elm completed in December 2015, had a PCI of 60 that cost \$240,000 and was in District 2. Mr. Gonzalez responds, "that's what is says...according to this."

Mr. Fischer asks if Mr. Gonzalez knew that Mr. Romero had property on Polk Street. Mr. Gonzalez said he didn't see or approve the list so he would not have known, and did not know he owned property.

Mr. Fischer now talks about the Stanton Street hump issue. Referring to admitted Exhibit G16 which is a memo dated January 22, 2015 from Ted Marquez to Fred Lopez whether speed humps qualified under NTMP resources. Mr. Gonzalez affirms he introduced this as an exhibit, but did not see it.

Mr. Fischer refers to Exhibit G21 offered by Jim Darnell, which was the January 26, 2015 email from Mr. Lopez to Mr. Marquez saying in essence that he had talked to the City Manager and to proceed with the installation. Mr. Gonzalez said the only interaction they had was the email on Saturday. Mr. Gonzalez says Irene Ramirez did not approach or talk to Mr. Gonzalez about the concerns raised by Mr. Marquez in his memo during the time between the 2 emails of 1/22/15 and 1/26/15, as referred by Mr. Fischer. Mr. Gonzalez says she did not. Mr. Fischer asks if during the same time, did Fred Lopez discuss or raise the concerns memorialized in Exhibit G16 raised in Exhibit G16 to Mr. Gonzalez. Mr. Gonzalez responds that he did not.

Mr. Fischer reads Resolution dated March 25, 2008 revoking the existing policy concerning "Guidelines for Speed Hump Installations," contained in Exhibit A, signed by Mayor Cook and moves that it be admitted as Exhibit ERC-1. Mr. Schwartz admits the exhibit. Mr. Fischer explains that Exhibit A attached to the Resolution is the exhibit submitted by Mr. Darnell to the Ethics Commission in response to document disclosure; it's the NTMP program document. Mr. Fischer asks Mr. Gonzalez if he agrees that that is the policy of the City of El Paso, as it relates to the installation of speed calming devices. Mr. Gonzalez agrees that the speed calming devices placed on Stanton was an arterial; wasn't part of this program. Mr. Fischer says he's just wondering if this is the policy. Mr. Gonzalez says that this is the first time he sees this document. He saw the attachment after the fact of this being in question, but that he's never seen this document, until now. Mr. Fischer states the document is the Resolution adopting the document that Mr. Gonzalez has seen.

Mr. Fischer introduces certain portions of the NTMP document and hands to Mr. Darnell ERC-2, being page 24 of the NTMP entitled "Eligible But Not Preferred." Mr. Fischer asks Mr. Gonzalez if he has seen this exhibit. Mr. Gonzalez says, "no, I don't think so. No." Mr. Fischer reads from the exhibit, "Generally, speed humps and tables are designed for local neighborhood roadways with specific traffic volumes, vehicle speeds and residential frontages."

Mr. Fischer asks Mr. Gonzalez if he's telling the commission that he hadn't seen this prior to the Stanton issue coming up. Mr. Gonzalez affirms that he hadn't seen this policy prior to it being put in place.

Mr. Fischer moves that ERC-2 be admitted. Mr. Schwartz admits it.

Mr. Fischer hands Mr. Gonzalez ERC-3, page 8 of the NTMP entitled, "NTMP Options" that has a flowchart with the NTMP process, and asks Mr. Gonzalez if he's familiar with this document. Mr. Gonzalez says, "no." Mr. Fischer asks if he knows that the process for utilizing NTMP resources involves public input. Mr. Gonzalez responds, "not beforehand. No. I do now." Mr. Fischer moves that ERC-3 be admitted. (admission by the ERC not heard) Mr. Gonzalez reiterated his experience with other cities is that you get requests and you act upon those, especially when they're safety-related.

Mr. Fischer asks if they can agree that the speed humps installed on Stanton St. were taken from NTMP inventory. Mr. Gonzalez responds that it was NTMP inventory.

Mr. Fischer refers to Mr. Gonzalez presentation that Mr. Gonzalez said he doesn't think the NTMP is applicable because Stanton St. is an arterial and asks if he understands his position correctly. Mr. Gonzalez says he didn't give specific instructions to get speed humps from the NTMP program. He simply asked, "can this be done?" and copied his supervisor and figured they had talked. The only email he got back was the process of how it could happen.

Mr. Fischer addresses the Commission and shows Mr. Gonzalez ERC-4, page 50 of the NTMP entitled, "Appendix A – Summary of Existing Policies" and for the record, reads and asks Mr. Gonzalez, if Number 1, "This program (NTMP) applies to existing residential streets that serve single –family residential neighborhoods." Is correct. Mr. Gonzalez agrees. Mr. Fischer's offers Exhibit ERC-4. Mr. Darnell intercedes that before that is admitted, if they could identify if Mr. Gonzalez had ever seen this document before the Stanton St. project. Mr. Schwartz responds that he can cover that with him later. Mr. Fischer goes ahead and asks Mr. Gonzalez if he had seen this before the installation. Mr. Gonzalez responds that he has not. No admission of Exhibit ERC-4 is heard.

Mr. Fischer hands to Mr. Darnell ERC-6, an email from Brianne Morales to a host of people including Mr. Gonzalez, dated February 4, 2015, with "Subject: EPDOT Response: speed bumps on Cathedral." Mr. Fischer reads, "Rudy Pino, Engineering Division Manager, met with the principal of the high school, Aurora Lujan, and Mr. Rimkus this morning. He explained that the Department of Transportation's recommendation was to install school flashers on Stanton." Email goes on to talk about the flashers and the 3<sup>rd</sup> paragraph says, "Mr. Pino explained to Ms. Lujan and Mr. Rimkus that there are potential negative impacts to installing speed cushions on multilane/high volume streets such as Stanton. In the past, when speed cushions were installed on similar streets, residents petitioned the City to have them removed." Mr. Gonzalez affirms that he was one of the recipients of the email, but that he gets lots of emails and doesn't remember getting this. He's sure he did, because he's copied, but he gets tons of email. Mr. Fischer offers ERC-6 and is admitted by Mr. Schwartz.

Mr. Fischer asks Mr. Gonzalez if he is aware that the Charter provision that charges the City Manager with saying that all acts of the City Council are faithfully executed. Mr. Gonzalez affirms.

Mr. Fischer has nothing further at this time.

Mr. Darnell says he has potential witnesses and understands Ms. Ramirez and Mr. Lopez may be called to testify and would be responsive to what they say or can put them on now in anticipation if the Commission wants or wait until later. Mr. Schwartz gives Mr. Darnell the option.

Mr. Darnell calls former Council woman, Ann Morgan Lily. In response to Mr. Darnell's direct examination, Ms. Lily testifies that she is not employed. She was a City Council Representative for 10 years for District 1; 8 years under Mayor Cook and 2 years under Mayor Leeser. During her time with City Council, she became acquainted with Fred Lopez.

Mr. Schwartz instructs that without the Commission's consent, it should be Mr. Gonzales directing the testimony. Mr. Darnell asks the Commission for permission to question the witness and is allowed to proceed.

Ms. Lily continues to testify that in 2005 when she was first at City Council she did not know much about City planning. Mr. Lopez worked in Planning and he would come and help her when a case in District 1 came up so she would know the pros and cons and know the answers in case some of her constituents called her. She became familiar with Mr. Lopez through the years and visited back and forth and as time went on, he wanted to move into another department. He complained on several occasions that the then City Manager Joyce Wilson, would not let him move up or be involved. Mr. Schwartz asks if this was a complaint to her. Ms. Lily responds that he went to her office and complained several times. After Ms. Wilson left and Mr. Gonzalez was there, Mr. Lopez came and told her that he was very happy and that he was going to be in charge of the Capital Improvement Program. Her last day in office was a year ago on June 13, 2015. He seemed to be happy. She went on vacation and returned in August or September. Probably in last of September or beginning of October, Mr. Lopez called her to come by to talk to her during lunch time. She thought he was going to tell her about all the capital improvement programs that he had going and she was excited to hear, but that's not what he said. He was upset because he had been moved to the Airport. His job was no longer the head of Capital Improvement and was very angry at Mr. Gonzalez. He said there had been an audit of the Engineering Department and that his audit did not come out favorably, and he felt that Mr. Gonzalez had asked Edmundo Calderon.

Mrs. Borunda Firth intercedes to say that the City Attorney's Office received a letter from Felix Valenzuela, lawyer representing Mr. Lopez, who can be allowed to make his assertion with regard to his client on the testimony about to be offered.

Mr. Valenzuela stated that he submitted a letter yesterday to the Ethics Commission pursuant to the City Charter, Ethics Code 2.92.090(d), which requires the Commission to consider preliminary issues before engaging in the hearing and the preliminary issues he brought up regarding Subsection (f)(7) as to the relevancy, reliability and usefulness of any testimony and he believes that the testimony that the Commission has taken up to now is neither reliable, useful and in particular, not relevant to this proceedings so he asks the Commission to consider that.

Mr. Schwartz asks Mr. Valenzuela if that is with respect to references to Mr. Calderon. Mr. Valenzuela responds that this is based upon the witness list that Mr. Darnell submitted, in addition to the summaries of each testimony that will be provided by the witnesses, so he asks the Commission not to admit this evidence because it's not relevant to the proceedings.

Mr. Schwartz asks Mrs. Borunda Firth if she has a comment and Mrs. Borunda Firth states that the way the Ethics Ordinance reads is if she can correct the situation to take care of it, which she can't. The second was to visit with the Chairperson to see if we could resolve the issue and if not, it's an issue for the entire Commission to consider so it's appropriate for the Commission to consider whether or not this testimony is reliable and the other issue that Mr. Valenzuela raised was the hearsay. Although the Commission is not bound by Rules of Evidence, there is some cautionary information in the Ethics Ordinance with regard to hearsay evidence.

Mr. Valenzuela states that the other aspect of the letter was the public discussion of any private employment matters of Mr. Lopez, which he believes is completely outside of purview of this Commission.

Mr. Adame states that he has a problem where this going with Mr. Fred Chavez is not the object of this ethic investigation and he guesses that what Mr. Darnell is trying to do is discredit his viability and credibility to give further credence to what the City Manager is proposing and doesn't see it as a way to do it. Mr. Valenzuela corrects the reference to the name as Fred Lopez. He doesn't know where this is going and doesn't know what this brings to the table accept former Representative's Lily's view of what she heard that day. It can't be corroborated. Mr. Adame asks Mr. Darnell if he has other witnesses that can do the same thing, and even if he did, what relevance would that have to this hearing.

Mr. Darnell responds that the witness' credibility is always relevant; that's black letter law. This is going to be very brief and that's why he said he could do it after Mr. Lopez testifies because he believes Mr. Lopez is going to testify that he told Mr. Gonzalez about Ted Marquez' concerns, which "we have denied," which make a swearing match, then it becomes an issue of credibility, and in this case, he's not going to get into what exactly what she would testify to, but it would be very short and directly on point, about Mr. Lopez' reason for coming forward. He called her, made an appointment with her. It's not an employment matter because she was a private citizen and he went to her house to talk to her and made what would be a threat. Mr. Adame says, "we're going to get into a he says, she says." Mr. Darnell says "that's where we are there already," and believes it will be, based on his conversation with Mr. Fischer and Mr. Gonzalez and Mr. Lopez, and that's where the credibility of the people speaking becomes relevant. He's not going to dwell on this, but thinks this is very credible.

Mr. Adame said it needs to be short or this can go all day. Mr. Darnell promised it would be short, and Mr. Schwartz allowed him to proceed and stated that they are not permitting hearsay statements so anything that Ms. Lily heard from somebody else is not going to be permitted; only direct conversations between Ms. Lily and Mr. Lopez.

Mrs. Lily proceeded to testify that Mr. Lopez told her that he was angry at Mr. Gonzalez and he felt that the financial report from the Engineering Department was not correct. He said at the end, he was going to have Mr. Gonzalez's job." He didn't mean that he wanted to take over Mr. Gonzalez's job. He said...Mr. Schwartz questions that he did not know what she was speculating, but to testify to what he said. Ms. Lily continued to say that Mr. Lopez said, I will have Mr. Gonzalez's job." First he said he wanted to sue the City and she and her husband (who is at a doctor's appointment said, "we don't think that's a very good idea." Then he said, "well, I'm going to have his job." Ms. Lily had nothing further.

Mr. Schwartz asked Ms. Lily if she knew if Mr. Lopez has applied at any time for the City Manager position. She said she didn't know. Mr. Schwartz then asked about an associate City Manager position. She responded that she thought he did under Mrs. Wilson, but doesn't know for sure. She is speculating. Mr. Schwartz asked if she was aware of any other efforts that he made to otherwise to have Mr. Gonzalez's job. Ms. Lily said she does, but it's all hearsay.

Mr. Echeverria asked when the conversation took place. Ms. Lily said it was in October, 2015.

Mr. Anchondo asked Ms. Lily if she knew if he ever filed a complaint against the City because he was moved. Ms. Lily said he did, but that she just heard.

Mr. Darnell asks the permission of the Commission that as it has been indicated, Edmundo Calderon is a potential witness and because that's a sensitive issue, can they hold on that until they need to. Permission granted.

Mr. Darnell calls Dr. Sutter and after being sworn in to testify, the witness identifies himself as Mark Sutter, CFO for the City of El Paso. He is a Ph.D. doctor. Dr. Sutter explains that his job with the City is CFO, he has the regular financial matters under him, treasury, accounting, financial reporting, purchasing. He has had some other less conventional assignments to his portfolio, including the public Health Department and the Capital Improvement Department ("CID").

Dr. Sutter testifies that he's aware of the street resurfacing issue. Mr. Darnell, states that there has been a question whether each resurfacing project is an individual project or if they are all one project for the whole City, and asks how it is handled from the financial perspective. Dr. Sutter responds that there is a balance; there is the project and there is the funding. The CFO will obtain the funding, issuing bonds; that type of thing. He had responsibility for a period of time with the CID. He became acquainted with the project list. For the funding perspective, they align types of funding with various issuances. The projects within those funding sources are individual projects. Mr. Darnell asks if each street is an individual project or the whole City be the project. Dr. Sutter responds that the City is not a project. You can have a project that's a long length of a street that can be broken up to various individual projects, but typically each street would be a project. Mr. Darnell asks if from the financial perspective, Dr. Sutter would say that the \$500,000 or the million dollar limit would apply to each individual resurfacing project. Dr. Sutter responds that the Budget Resolution having to do with having to move money between projects, he would view each street as a project.

With regard to the speed hump issue, Mr. Darnell asks Dr. Sutter if he knows how that was ultimately paid for. Dr. Sutter responds that the speed cushions were installed with a combination of funds. The email he got from Richard Bristol indicated that the charges were made for the labor and that type of charge to the general fund. And because the cushion itself was in inventory, it was taken out of inventory. That inventory was originally funded by bond monies. Mr. Schwartz commented "NTMP." Dr. Sutter responds that the bond issuances is an authorization and within that authorization are various categories of money. The NTMP program is in there and it was the money spent in that category that actually supplies the inventory of cushions. Mr. Darnell states that his understanding was that the cushions were actually in inventory with the City. Mr. Schwartz clarifies "with NTMP." Mr. Darnell and Dr. Sutter affirm. When Dr. Sutter became aware that this combination was going on, NTMP was the funding source, but these cushions were not part of the NTMP program. He directed staff that that cost was not chargeable to the bond funds, but should be paid with general fund monies as the rest of the costs of installation were handled. Mr. Darnell asks now that if now with the

street car project moved up Stanton Street, are the cushions back in inventory. Dr. Sutter responds that when the street cushions were removed, they were put back into inventory. MR. Schwartz asked if they can be reused again. Dr. Sutter said, "yes," and if that is the case, there are occasions where staff will install cushions for temporary purpose, and then pull those up and put them back in inventory because one use does not wear them out. They have an extended life where they can be reused. Mr. Schwartz asked if the general fund ever reimburse the NTMP for the street cushions. Dr. Sutter that yes, staff was directed to do a journal entry with closing of 2015. Mr. Telles asked if that reimbursement was returned after it was put in NTMP funds. Dr. Sutter restates that if he's asking if the funds from the general fund to the NTMP were refunded after the cushions were put back, he doesn't believe they were. Mr. Telles asks if the projects and individual categories are defined some place to understand where the costs are coming and going. Dr. Sutter explains that from an accounting financial control, they want to set up budgets for projects and they control the budget as they move along so to answer the questions, particularly defined some place, he's not sure about that. Mr. Telles explains that the reason for his question is because there's control for financial purposes and for a project issue where it's broken down into pieces to make sure where the funds are going or how they're paid, so he's trying to find out; that their definition of project is an individual street. Dr. Sutter's purpose is for a financial control reason, not for a management control operation reason, and that's what he's trying to understand. Dr. Sutter responds that it's more of a combined effort; that the accounting staff does not define a project. If they were going to do an intersection, CID will define what's actually in that project so that is under the control of the financial department staff, so they are defining what the street is going to be, resurfaced or reconstructed, so the staff, the Comptroller Office and the Budget Office works with CID staff in the assignment of the name and the project number, so it is a combined staff effort. Mr. Schwartz asks if he understands that the CID selected streets solely on the pavement indexed rating. Dr. Sutter said that was not his understanding. He understands that years ago a study was done with a ranking, but it has been changed from time to time, but he wouldn't say that was the sole criteria. Mr. Schwartz asks if he's aware of any instance where City Council has voted in advance of those changes to approve streets where pavement condition was higher than permitted by the CIP before the fact. Dr. Sutter doesn't believe so. He doesn't remember Council discussion about the pavement index and having that as a criteria for discussion and altering that.

Mr. Fischer asks, and Dr. Sutter affirms that acknowledges that the installation of the speed humps should not have been paid for with funds designated to the NTMP account. Mr. Fischer asked when he had that reconciled. He had discussions with staff in year end this August 31 that they needed to be charged to the general fund since that wasn't part of the bond program as far as the NTMP programs and wanted to make sure they maintained the integrity of bond monies, but the fact that it hadn't been charged came to his attention after the August 31 date, but they have an extended period to close the books so that charge occurred after August 31, but was charged back to the pre-closing entry so it was maintained in the 2015 where it belonged.

Mr. Fischer asks and Dr. Sutter affirms that he testified that each street is a project, and adds that a street may be more than one project, as it may have several phases of it and gets set up from project numbers. Mr. Fischer refers to the reconciliation report admitted into evidence that was brought to Council in December 2015, that it had streets that were added by staff to the CIP that were not in the originally approved CIP 2012, streets that were added probably administratively;

asks if each of those would get a new number. DR. Sutter responds that he believes it would because the project numbers are controlled by the CID staff. They are the ones that originate the projects, define them and have everything in there from design, engineering, all the way through construction and for their purposes, they want to maintain a box around the costs with each of those projects so any time that they would have a different street, they would assign a new number. He doesn't know if they had a number that they changed out the title of the project and used the existing number, but can't swear to that; is not positive.

Mr. Fischer refers to Section 9 of the Budget Resolution, that states, "the City Manager is authorized to add to an existing capital improvement program, addition of a project to an approved Capital Improvement Program, must meet the purpose of the proceeds from which the original CIP was funded," and asks Dr. Sutter that on street resurfacing, as long as there's an additional street resurfacing, is fine. Dr. Sutter responds that that language has to do with bond authorization, so when they work with bond counsel to put the language around what they're going to do with the money from that bond issuance, generally they don't want to have so strict a definitions where they box themselves in and can't use the money for other City needs, but having said that, they try to limit bond issues to street resurfacing, street reconstruction, so when they talk about the big bundle of money, it generally has several definitions of types of projects that are covered and they don't want to mix the use of funds in an inappropriate bond issuance. Mr. Fischer says that's the first part of the authority delegated to the City Manager is that the purpose of the proceed from where the original CIP was funded must meet those and if it's Dr. Sutter's understanding that the addition of such projects, that was also in Mr. Gonzalez' presentation, cannot exceed more than \$500,000 without City Council authorization. Dr. Sutters affirms that's his understanding.

Mr. Schwartz asks and Dr. Sutter responds that he doesn't know the total cost of the improvements requested by Mr. Romero. No further questions.

Mr. Darnell says they may need to call further witnesses, but will rest at this point.

Hearing in recess at 1:10 p.m. Hearing reconvened at 1:22 p.m.

Dr. Sutter asked to clarify a statement he made earlier. He called the deputy director in the Streets Department to verify project numbers and was told they go by year of the authorization to do the project so they lay out. If doing 5 million dollars in street resurfacing, that gets allocated over several years so Council gets involved on when that allocation is going to be. Sutter works on it from the funding side on what kind of debt service they can afford for the different bond issues. He asked about the projects themselves and was told. Do you actually have them in PeopleSoft, the accounting system, do you actually use a project number separately for each street project and he said, "no." They do that in the spreadsheets. So in his mind, he was incorrect because he thought they had a separate project number in the PeopleSoft system for each of the resurfacing projects, but he was told there are too many projects to do that so they do that on spreadsheet so they maintain the projects at the project level in the accounting system is done by the year of authorization for resurfacing, so they have the 2015 resurfacing, 2016 resurfacing, 2017 resurfacing and then within that numerous projects.



Mr. Schwartz reminds Dr. Sutter that his testimony earlier was that each project could not exceed \$500,000, and that each project was a street and asks Dr. Sutter if that means that so long as a City representative puts a street on the list, it would cost \$499,000. Dr. Sutter responds that he would think of it in terms if he had a project amount for the year, for example if they have 2015 resurfacing projects and it has a total of x amount of million dollars and if they're changing streets within there, it's not even changing the project number, so it's like saying, "ok, you're going to swap out this street, put in this street," and if the totals aren't changing, then we're not even needing to do a budget adjustment because there is no change in that line item from the accounting perspective.

Mr. Schwartz says as he understands it, the CIP said there could not be an aggregate change that exceeded \$500,000. Dr. Sutter said, "yes, if we're talking about an increase," so if he was talking about increasing street resurfacing project 2015 by more than \$500,000, that's where that cap would come in. Mr. Schwartz asks Dr. Sutter if he would acknowledge that the CIP describes streets that required resurfacing and they were the highest priority of streets contained on that list. Dr. Sutter responds, "yes," so a list was generated. Mr. Schwartz continues to say the fact that you took a street that was not on the list and you added it, it automatically precluded another street from being resurfaced that had a higher priority and was on the list. Dr. Sutter responds, "yes," and asks Mr. Schwartz if his question is that if he added a street that was not on the list and added a PMI that was higher than one of the other streets, and were still staying within the total, then something would have to be bumped.

Mr. Telles says that he thinks they're talking about two different things and that Dr. Sutter's testimony is not necessarily relevant to the issue we have here because your project is funding for the year, an accounting concept that if we don't go over the approved budgeted amount, we're ok. Whatever happens under that. and you said the detail was kept by spreadsheet, whatever happens under that, that's not a financial issue. The issue on we can't make a change greater than \$500,000, that's a project issue that he understands is an operational issue. Asks who prepares and keeps those projects and costs by individual street as it relates to Dr. Sutter's example of 3 million dollars. Dr. Sutter responds that the spreadsheets are kept and monitored by the Street Department staff, but he disagrees with his statement as to where does the limitation come in on the \$500,000, the million dollars. Reminds him that that is called out in the budget resolution so that is on the financial side and in their accounting system; that's what that relates to. So the \$500,000 and the 1 million dollars referred to in numbers 18 and 15, whatever they were in the budget resolution, had to do with larger numbers dealing with in the accounting system not with specific resurfacing project kept on the spreadsheet because the budget resolution has to do with the accounting system.

Mr. Anchondo asks, "Let's say you budget 1 million for one year and you have under that million dollars several projects and those projects are divided up however they're divided up and as long as you stay in the 5 million, you're ok, but how do you decide which project can be changed. Like from project 2 to project 3. How do you change the funding?" Dr. Sutter responds that he would have to contrast the resurfacing projects with the reconstruction project, being much larger and having its own number in the accounting system from which they can pull out a report indicating what the budget is, how much was spent, because they have that number in the accounting string. What Mr. told him on the resurfacing projects was that they have so

many of those projects, they don't have individual project numbers assigned to all the individual resurfacing projects so if they say, "this project needs \$10,000 to complete it and is under budget," they're keeping all those on their spreadsheet, then they would be responsible for that schedule for making that change, but still has to reconcile in total to what the grand total is, so let's take the 5 million dollars, the resurfacing projects would still have to all add up to the 5 million dollars. Mr. Anchondo asks if moving one project to another usually happens as long as you meet the 5 million. Dr. Sutter says it happens very frequently because you set up a budget for project, but until you get into the construction project, you don't know what it's going to cost, and there will always be budgets that are a little rich for the project and budgets that may have a complication and a little needs to be added for the project to be completed so it's more common than not that there is fluctuation and even if budgeting on the plus side and coming in under budget as you're finalizing all your projects, and the little bits that are left become another project or help to complete another project that was underfunded.

Mr. Telles gives an extreme. If you got a 5 million dollar project and they are 5, 1 million dollar projects and if operations decide they're not going to do Item 4. They're going to do Item 6, I'd still come out at 5 million dollars. Is that an issue you would report because operations decided to make a million dollar cumulative change, he doesn't think it is an accounting issue and asks Dr. Sutter what he would do with it. Dr. Sutter responds that from the accounting perspective, where you have larger project numbers and are part of the account stream, then money has to be moved from one budget line item to another budget line item and has to be submitted to the budget office. The budget office then has to make that change and those would get noted and have an approval process within it and when they are capturing the detail in the accounting system with that project number, then they have to follow the process and changed to budgets to track what they're changing. That's where the rules come in that are related to the budget resolution. The resurfacing projects are being kept in the spreadsheet because there are so many of them, they're not doing the tracking of those changes because they're not being done in the budget office. Dr. Sutter asked if that answered Mr. Telles' question. Mr. Telles said he did, and asks that if you got a million dollar resurfacing, they keep a list of it and operations make changes that exceed \$600,000 or \$500,000, that's something you would not be looking at that is their responsibility to track because within that resurfacing project, they made changes and accumulative changes, they are what they are, but because it's one project from the financial perspective, it's defined differently from an operational perspective. Dr. Sutter responds that on if we're talking about just resurfacing, the comptrollers' staff would not see those changes because they're not tracking at that fine of a detail, so those would be undetected. Mr. Thomas Bray then asks as for resurfacing you track the overall budget and each individual project because there are so many of them that's handled offline on a spreadsheet, he's assuming were tracked from your perspective at that detail. Dr. Sutter responds that that's correct, but having said that, brings to the attention the amount of detail being presented to Council is at those project levels so even on the resurfacing, if you go back and look at the presentations that have been done for Council about what's in the resurfacing list, what's being added, where they're making changes, that comes to Council with a lot of detail from the department, not from the Comptroller's Office. There's 2 sets of reporting going on in the financial side or the budget side, but because they're tracking on that large number, that change differential is not going to show up, but the department is reporting out on those individual projects and they talk to Council about what changes they want to do on the resurfacing.

Mr. Anchondo asks that if you get a project that is \$500,000 and only use \$400,000, the \$100,000 is put into the other project. Dr. Sutter responds, "yes." you have another project that you ran into problems in the resurfacing and it cost more and you have some left overs, they will move it down to complete that project.

Mr. Echeverria asks if they move down to another project previously approved, overseen, or do they just moved the funds for another project that may arise takes that money. In other words, if going down by the streets, if the project is completed that was originally forecasted for more money and now suddenly you do end up with more, is there a methodology or a list of projects that can take up that money that City Council can see or who makes the decision on which projects are going to use those funds.

Dr. Sutter responds that the Street Dept. would be managing that long 70-80 project list so let's say budget for 2015 resurfacing was 2 million dollars, they have 80 projects. They're managing those 80 projects within that 2 million dollar total, so Council has been informed about these 80 projects, so when they finish a project and have some money left over, and they know they're having trouble with another project, that excess money would go to the project in need. If asking what's the process for the allocation and if it has some formal mechanism for approval, then he would say that's informally handled by the department. Mr. Echeverria asks if there are certain programs within a fiscal year that need to be completed, going back to the 80, is there a way to prioritize those. Some are funded. Some are not, but there's probably money allocated to it, so is there a list that someone prioritizes. Dr. Sutter is not aware of the prioritization mechanism in that department.

Mr. Telles makes one more clarification and asks if it's a true statement that if there is access in a project and several others, that money is applied to something not originally in the list. Dr. Sutter replies that it could be. That sometimes they could get recommendations from the contractor that's out there resurfacing and they may be coming along and say that they come to this intersection and may need to do a 10 foot extension on either side to maintain the integrity of the work that they're doing so they may make that call in the field as the project is rolling along where you're not coming back to council and saying, "we're going to make this change right here because that would be a very good bank for the buck, extends the total life of that intersection, so there's those types of things that go on fairly frequently where they're making those judgments as they move along.

Mr. Schwartz asks how much of the CIP was spent. Dr. Sutter replies that it's a big question if talking about the CIP. Mr. Schwartz clarifies that it's street resurfacing. Dr. Sutter said he doesn't know, but that he could find out and because of the issues about resurfacing projects that came up last fall, the call was made by the interim CID director, that they stop doing resurfacing until sorted out with Council as to what they want to resurface. How they want to handle projects. Without looking at the numbers, have to be way under budget. However, the way the City of El Paso runs the capital projects and the funding for those, we have All Years Budgets. We have some budgets that are just annual, like the general fund. We get to the end of the year and closes out and start fresh the new year. In the capital projects, those budgets are ongoing. We could be in 2016 and if there's money from 2015 left over, let's say on resurfacing, that money is

used until all that money is used up. They may be also using 2016 money, but at this point, the 2016 has to be well underspent.

Mr. Schwartz asks Dr. Sutter if he's aware that one of the allegations in the Tolbert complaint was that money was spent to resurface previously paved alleys and he's also aware that the CIP program prohibited spending money on previously paved alleys. Dr. Sutter responds that he wasn't aware of all this before this came up and now he's aware of it. Mr. Schwartz continues to ask that there was approval somewhere by somebody to permit previously paved alleys to be paid with CIP monies that were not authorized. Dr. Sutter responds that if he remembers correctly, the idea of not using money for previously paved alleys was that there was quite an extensive list of alleys that needed to be paved that had never been paved and the idea was to spend the money on those alleys. He doesn't know how these alleys got approved for repaving and has never inquired.

Mr. Schwartz asks where does the buck stop to make certain that previously paved alleys are not repaved with CIP money. Dr. Sutter replied that it stops with him. Mr. Schwartz asks if not with the City Manager. Dr. Sutter states that the City Manager is responsible for all City operations, but he thinks that while CID was under Dr. Sutter's direction, he's responsible for what CIP did. Mr. Schwartz asks why did he authorize paving of previously paved alleys with CIP monies. Dr. Sutter replied that he doesn't know who authorized previously paved alleys. Mr. Schwartz says, "well, the buck stops with you." Dr. Sutter says, "yes," and Mr. Schwartz asks Dr. Sutter to help him understand that. If the buck stops with him, then he's the one responsible for authorizing the repaving of previously paved alleys. Dr. Sutter replied that he's responsible, but that does not mean that he authorized it. Mr. Schwartz says, "So the buck stops with you, but you can't pass the buck to somebody else." Dr. Sutter responds that he's not passing the buck. He's just saying he's responsible, but not saying he gave the authorized action to go do something.

Mr. Telles asks Dr. Sutter if he's responsible for capturing the financial impact of the transactions or for the operational decision related to where the monies were to be spent. Dr. Sutter responds that until the City recruited and hired a Public Works director, the CID department reported to him so he was responsible for both things.

Mr. Schwartz asks who makes inquiries with respect to why these previously paved alleys are going to be repaved with CIP monies and requests an explanation of the rationale. Dr. Sutter responds that that would be done at the departmental level since nobody came to him to ask if they should repave a previously paved alley. Mr. Schwartz asks and Dr. Sutter affirms that that decision is made at the departmental level. Dr. Sutter says that nobody asked him so it had to be made at a level lower than him.

Mr. Schwartz asks if these are federal or state funds that are in the CIP program. Dr. Sutter responds that the resurfacing money being discussed is taxpayer money, not federal or state money.

Mr. Thomas Bray goes back to the list of resurfacing streets, and understands that a street could have more than one project depending on the length of the street and how projects are defined.

Also asks that if he comes in under budget on one project, he could allocate the unused funds to another project that may be in need. If we go through the entire list that has been approved, and you've been under budget, highly successful on all those projects and you have left over budget, do the procedures or policies allow them to add additional streets so long as you're under the overall cap for resurfacing. Dr. Sutter replies that yes, although, when they talk about significant amounts of money left over, it's helpful to understand that Council is constantly making requests and staff has to find ways to fund those requests, but if they got to the end of the year and have a lot of left over money, that would be one of those situations to go back to Council and say, "we got an extra 1.5 million dollars left over," and that's a significant amount of money to do a sizeable project. Then you would want your elected to get involved in the decision and prioritize what they wanted to do.

Mr. Anchondo asks if his understanding is that Council keeps on making requests for changes. Dr. Sutter says that what he said was that Council was constantly making requests for projects, whether it's additions to projects, changes to projects, brand new projects and that's the nature of how they operate

Mr. Untereker wants to understand that on all these changes to the CIP, no one is keeping track of that \$500,000 limit per project dealing with the resurfacing. Dr. Sutter responds that he wants to distinguish again. If the resurfacing as a project increases, then those budget resolution provisions kick in and is trying to distinguish between the projects that are being kept on a spreadsheet because there are 80 of them and they make up the budget for the year. That project line item which has a project code in it, the budget resolution provisions apply to that line item, so movement of money within there isn't necessarily going to trigger anything at the budget office or any place else as far as, "oh, we've hit a limit" because that's within that line item. They contrast that with projects that have their own project codes, which if it gets outside of resurfacing, then you're into the other realm, which is all the projects have these project codes, and those, if they want to increase and decrease them, there actually is the process to go through the Budget Office.

Mr. Untereker asks that going back to the resurfacing, if it's his department that's keeping track of the aggregate changes and whether or not it's approaching that \$500,000 limit. Dr. Sutter said it's the budget department.

Mr. Schwartz is still trying to understand how a previously paved alley can get on that list. Dr. Sutter replies that he doesn't have an answer for him.

Mr. Adame goes back to speed bumps referring to Mr. Tolbert's complaint, asks Dr. Sutter that when he did the reconciliation to move the money from the general budget to the NTP and reimburse them for those speed bumps, there was a considerable amount of time between the time the City Manager announced how those speed bumps were funded and by the time you did your reconciliation, was he influenced at all by the newspaper articles. Dr. Sutter responds "no" and that he thinks the direction to staff that the cost of the cushions need to be charged to the general fund was made in a timely manner. In finding out those cushions were paid with bond money, which was a specific program and this is not part of that program so it needs to be charged elsewhere; that direction was given in a timely manner. He thinks the newspaper articles

brought it to light and that was the checking up again and saying, “has that been done yet?” Since the books were still open, “do it now” and were charged to the year that it happened.

Mr. Adame tells Dr. Sutter that he said the reconciliation took place as he was wrapping up year end so there was a considerable time between the actual comment and the actual correction so to Mr. Tolbert’s complaint, was that influenced at all by the newspaper. Had the newspaper not brought it up, would it have happened at all. Dr. Sutter replies that the newspaper bringing it up, brings to light the question about what was the funding source and had that been corrected. He doesn’t have enough recollection of the dates and times, but it wasn’t in reaction to, but rather a followup to.

Mr. Schwartz asks how NTMP equipment can be accessed for a non NTMP project. Dr. Sutter responds that when you get to the operational level, Joe knows where the speed cushions are and Joe goes and gets the speed cushions. Sometimes when you look at operational decisions that are made at a higher level vs. what goes on operationally at a lower level, there’s always that connection there, so the person that goes and gets the speed cushion out says, “we always get the cushions charged like this so therefore it must be charged like that” without a thought process as to whether it went through the NTMP process, CIP program and so forth, so there’s a disconnect there where the person that does the work pulls something out and says, “how do we do this? We always do it this way,” and they don’t question their mind that it may be any different cause they don’t know any better.

Mr. Schwartz asks that once the person pulls the item from inventory, it has to be accounted for so somebody would submit a requisition or something or report the fact, “I just pulled NTMP inventory for Stanton St.” and then somebody’s got to say, “wait a minute. Why are you pulling that for Stanton St. because that does not qualify for NTMP funding?” Dr. Sutter understands and that’s what he’s saying and thinks that the people that pull that speed cushion out of inventory and those that are processing that transaction at that level, have no idea about the rest of the conversation. You’re issuing a speed cushion. Speed cushions are always charged to this line item and they go on with life. There isn’t a recognition that this is different than the other ones.

Mr. Schwartz asks if that is never reconciled to NTMP funds. Dr. Sutter responds that the speed cushions, as part of the NTMP program, are always handled the same way. Mr. Schwartz is not sure that answered the question. It’s never reconciled with NTMP funds and clarifies the question. At what point does somebody realize, “wait a minute. Those speed humps are NTMP inventory and they should not be built on non NTMP projects.” Dr. Sutter responds that that happened at his level and that was his question. That didn’t occur to anybody else. It was just, “install the speed cushions.” When staff told him the process to do speed cushions, and refers to his email where he asked if they were departing from their normal process. Mr. Schwartz acknowledges seeing the email. Dr. Sutter continues to say that that is the kick off that this should be handled differently, but the people that are doing the work, don’t understand that at all. He understood it because he wants to protect the integrity of his funding source, which is his bond money and doesn’t want somebody to come in and question, “are you using bond money for unauthorized things that it wasn’t supposed to be used for.” He doesn’t want to endanger tax definitions that we have related to our bond funds.

Mr. Telles asks if there is an NTMP project manager that tracks the projects as to costs. Dr. Sutter responds that he doesn't know if there's a separate NTMP program manager or if it's just a program run by several people so he can't answer that.

Mr. Warach asks what made Dr. Sutter aware that these were not appropriately used; that you shouldn't have used the NTMP money for these speed humps. Dr. Sutter responds that it was a discussion about the speed cushions and the NTMP program itself because prior to that, he wasn't aware that speed cushions had a process that you went through, you had to file a petition and all those business until that explanation came up and realized they were not talking about installing speed cushions in that program; this was something else that's being done.

Mr. Warach asks Dr. Sutter what was the context of that discussion. How did that come up? Dr. Sutter responded that he did not remember; he would have to go back through the email string to refresh his memory on how it came about. Mr. Warach asks if it was internal. Dr. Sutter says, "yes, as I recall."

Mr. Schwartz goes back to the alley resurfacing and asks if an alley gets resurfaced, which is not permitted by the funding source, is that funding source reimbursed with general funds, and that funding source is now available for other appropriate projects. Dr. Sutter responds that the general rule is that if you have funds that are restricted, whether it's a revenue fund restriction or bond fund restriction and money gets expended for whatever reason, you have staff that didn't know and they charged the wrong number or whatever that reason is, then and typically, yes, they would go back and say, "what's the proper funding source for this" and in the absence of any other funding source, it always goes to general fund.

Mr. Schwartz asks if the CIP was been reimbursed for the repaved alleys. Dr. Sutter say he doesn't believe so because that issue didn't come up with the same light bulb going on right now. He doesn't know that the funding restriction that Mr. Schwartz is referring to would necessarily apply when they are not supposed to repave already paved alley ways. That's not exactly the same as saying "we're going outside the program." It's in the program, and that's a restriction and gets what Mr. Schwartz is driving at.

Mr. Schwartz states that in fact there was a restriction against repaving paved alleys. Dr. Sutter responds that he understands what he's saying, "yes."

Mr. Adame returns to the speed bumps. He believes the City Manager said that the motivator for having those speed bumps there and the expediency for moving on that action item was a safety issue, which he highly commends and supports. Mr. Adame asks if there's any data as to how many incidents occurred in that street in from of Cathedral whether it be an automobile, a pedestrian or a student and even an animal. Dr. Sutter says he doesn't know. Mr. Adame asks anybody in attendance if the now. Mr. Gonzalez responds that he doesn't have that at his fingertips.

Mr. Schwartz addresses Mr. Adame that there was no imperical information that was gathered to determine whether that portion of Stanton St. created a safety concern and asks Mr. Gonzalez if

that is correct. Mr. Gonzalez responds that that's the reason why he made the request, "can this be done?" so that staff could do the analysis just like they would on any other project request that they get and doesn't recall having any of that information, but then again, he was shown an email a while ago that obviously he didn't read because it was addressed to Jeremy Jordan so he doesn't know whether he received it or have it; doesn't remember having that information.

Mr. Gonzalez does not recall receiving the email from Ms. Morales and he doesn't make it a priority if not addressed to him, but he doesn't delete his emails. He doesn't check his email constantly and doesn't recall the emails from 2015. He gets copies on a lot of email and doesn't know if that email is still in his inbox. Email was addressed to Jeremy Jordon.

Mr. Fischer states that this is not merely operational but has an ethical component. Mr. Fischer explains that this is regarding each of the allegations on the Stanton and resurfacing issues. He asks the Commission to consider whether Mr. Gonzalez deliberately thwart the execution of a city ordinance, rule, regulation or official city program and disregard of city policy or procedure by authorizing the resurfacing and installation of speed cushions. Third issue is on Section 2.92.05(d) on the ethical conduct of employees.

Mr. Fischer offers Exhibit ERC -10, Order, Agreed Resolution and Letter of Reprimand signed by Romero, and states that this was not policy violations but efforts to have repavement done with CIP funds. Mr. Darnell objects that this is not substantive evidence because Mr. Romero has never testified and would not be allowed in any court. Mr. Schwartz notes the objection, but does not agree and responds that it goes to weight and will be considered.

Mr. Fischer offers Exhibit ERC-7, Affidavit of Irene Ramirez. Mr. Fischer reads the Affidavit. Mr. Darnell object to the last paragraph as being blatant hearsay and Mr. Gonzalez not having opportunity to confront the accusation of Ms. Ramirez. Affidavit is admitted.

Mr. Fischer offers Exhibit ERC-8, Affidavit of Fred Lopez. Mr. Darnell objects to the last paragraph on Pg. 1 and the paragraphs on Pg. 2 as hearsay. Affidavit is admitted, striking the phrase, "to City Manager Tommy Gonzalez" on the last paragraph on 1<sup>st</sup> page. After discussions on the objections to the 2<sup>nd</sup> page, objection on 1<sup>st</sup> paragraph is overruled, 2<sup>nd</sup> paragraph is noted and will take it to weight. The last paragraph is struck. Mr. Fischer reads the Affidavit of Fred Lopez.

Mr. Schwartz clarifies the exhibits admitted. ERC 5 was not offered.

Mr. Darnell introduces Exhibit G-33, article from El Paso Times dated 1/18/16 indicating that once the speed humps were removed, Cathedral High School administration was again concerned with safety around the school. Exhibit G-33 is admitted.

After being duly sworn, Monica Lombraña, acting Director of the Capital Improvement Department and Director for the Airport is called to testify by Mr. Darnell. Mr. Darnell offers Exhibit G-12, City's 2015 Budget Resolution, Par. 8 & 9, 11 pgs. Exhibit G-12 is admitted. Ms. Lombraña testifies on her involvement regarding the street program. She explains what a project



is and how projects are funded and what departments and staff request and/or manage the funding.

Mr. Fischer asks Ms. Lombr  a about the 2012 Street Surfacing and the criteria considered based on 2008 Pavement Condition Index and the additional streets that were not in the original plan and in District 2 would have been approximately 1.3 million dollars. Ms. Lombr  a clarifies that 1.3 million was not the total; it was the approved funding for Monroe and Van Buren and were included in the original 2012 Plan. There was no funding added; just a scope change initiated by the Streets Department. She has no knowledge of repavement of paved alleys with CIP funds and has not inquired. She has not had any conversations with Mr. Gonzalez since the allegations were brought up. They now have a specific list of streets to be resurfaced and reconstructed that was approved by Council. Her job was to reconcile and account for the funding. Mr. Darnell offers Exhibit G13, 1/25/16 Power Point presentation by Ms. Lombr  a. They are not proceeding with any project that is not on the list and will not stray from that.

Mr. Sutter clarifies that he did not approve unpaved alleys, and only became aware as a result of this.

Mr. Darnell addresses the Commission to give a closing argument and summation of the testimony and evidence. He states that based on the testimony and evidence presented, this was all operational and not an ethics violation.

Mr. Fischer reiterates what he has previously stated and that these are ethical issues and that the evidence he submitted is credible evidence.

The Ethics Review Commission adjourned into Executive Session at 3:33 p.m., in accordance with Texas Government Code   551.071, by unanimous vote to deliberate.

## **VI. DELIBERATION AND DISPOSITION OF SWORN COMPLAINT.**

The Ethics Review Commission reconvened Open Session at 5:07 P.M. having met in closed session pursuant to Texas Government Code   551.071 and   551.074 and sought the advice of its attorney and deliberated with regard to the complaint issued by Jim Tolbert.

Mr. Echeverria makes a motion that Mr. Tommy Gonzalez be issued a letter of admonition for violating Section 2.92.050 by recklessly disregarding applicable policy or procedure and by authorizing the installation of speed humps on Stanton Street. Mr. Telles seconds the Motion and the Motion is passed unanimously.

Mr. Telles makes a Motion that Tommy Gonzalez be issued a letter of notification for violating Section 2.92.050(n) by recklessly disregarding applicable policy or procedure by authorizing an unqualified alley to be resurfaced in District 2. Mr. \_\_\_\_\_ seconds the Motion and the Motion is passed unanimously.

## **VIII. ADJOURNMENT**

Being no further business a Motion is made by Stuart Schwartz to adjourn the meeting, seconded by \_\_\_\_\_ and unanimously carried to adjourn the meeting at 5:10 p.m.

**Date Approved:** \_\_\_\_\_